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Implementation of recommendations on the six mandated areas of the Forum and on the Millennium Development Goals

Information received from the United Nations system and other intergovernmental organizations**

World Intellectual Property Organization

Summary

The present note by the World Intellectual Property Organization (WIPO) is a response to the recommendations of the Permanent Forum on Indigenous Issues made at its fifth session in 2006. In particular, attention is drawn to (a) draft instruments for the protection against misappropriation and misuse of traditional cultural expressions/expressions of folklore and traditional knowledge being discussed by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore; (b) the WIPO Voluntary Fund for Accredited Indigenous and Local Communities; (c) WIPO consultations and studies on the relationship between customary law and intellectual property; and (d) several practical capacity-building initiatives being undertaken by WIPO, as requested, inter alia, by the Permanent Forum, such as the development of tools to guard against the illegitimate patenting of traditional knowledge and the elaboration of intellectual property guidelines relating to the recording, digitization and dissemination of intangible cultural heritage. This latter initiative includes an ongoing partnership between WIPO, the International Labour Organization and the Maasai Heritage Preservation Foundation relating to the protection, promotion and preservation of Maasai cultural heritage.

* E/C.19/2007/1.

** The submission of the present report was delayed in order to ensure the inclusion of the most recent information.

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I. Responses to recommendations made by the Permanent Forum at its fifth session: obstacles to implementation of recommendations or other policies relevant to indigenous peoples and other significant information

1. The discussions at the fifth session of the Permanent Forum and the recommendations made at that session that addressed or were otherwise relevant to the World Intellectual Property Organization (WIPO) continue to provide valuable input not only into the work of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore itself, but also the broader activities of WIPO on related issues.

Draft instruments on the protection of traditional cultural expressions and traditional knowledge against misappropriation and misuse

2. The protection of traditional knowledge and traditional cultural expressions against misappropriation and misuse is the subject of active policy development, norm-building and capacity-building programmes at WIPO. Policy development and norm-building take place mainly within the WIPO Intergovernmental Committee.

3. WIPO member States have called for accelerated progress in this area, stressed the international dimension of these questions and emphasized that no outcome of the work of WIPO in this area is excluded, including the possible development of an international instrument or instruments. They have also emphasized that the work of WIPO should not prejudice developments in other forums.

4. The recent sessions of the Intergovernmental Committee have examined draft principles and objectives[1] that could shape sui generis instruments on traditional knowledge and traditional cultural expressions. This approach to protection could recognize, among other things, collective interests in traditional knowledge and expressions of traditional cultures which are characteristic of a distinct cultural identity. These interests would be respected for as long as traditional communities continue to be associated with the knowledge or cultural expressions.

5. These drafts include compliance with the principle of free, prior and informed consent and the recognition of customary laws and practices. In line with the views of many indigenous and traditional communities, the draft provisions do not require the assertion of new exclusive property rights over traditional knowledge or traditional cultural expressions, but accommodate this option, should communities wish to do so. Similarly, prior registration or documentation of traditional knowledge and traditional cultural expressions is not a precondition for protection.

6. The drafts have not been adopted or endorsed by the Intergovernmental Committee and may be developed further. They draw upon a wide range of community, national and regional experiences and have been developed over several years by and in consultation with member States, indigenous peoples and other traditional and cultural communities, civil society organizations and a range of other interested parties. Successive drafts of the objectives and principles were the subject

[1] See WIPO/GRTKF/IC/10/4 and WIPO/GRTKF/IC/10/5, available at http://www.wipo.int/meetings/en/details.jsp?meeting_id=11222. Comments received on earlier drafts are available at http://www.wipo.int/tk/en/consultations/draft_provisions/comments.html.

of open commenting processes established by the Committee. The drafts directly incorporate drafting proposals made by many participants in the commentary processes, including indigenous communities. The secretariat of the Permanent Forum has also contributed valuable comments as part of the commenting processes. Details of the background to these documents and the wide range of materials and perspectives that shaped them, can be found on the WIPO website.[2]

7. These draft materials are being used as points of reference in a range of national, regional and international policy discussions and standard-setting processes. Several processes in other policy areas draw directly from the draft WIPO provisions.

8. While the draft objectives and principles have no formal status, they illustrate some of the perspectives and approaches that are guiding work in this area and could suggest possible frameworks for the protection of traditional cultural expressions and traditional knowledge against misappropriation and misuse.

9. There are two distinct sets of draft objectives and principles, the first dealing with traditional cultural expressions, or expressions of folklore, and the second with traditional knowledge as such. This responds to the choice made to address separately the specific policy and legal questions raised by these two areas. The draft materials are prepared with the understanding that for many communities these two issues are closely related and integral to the respect for and protection of their cultural and intellectual heritage. The two sets of draft objectives and principles are therefore complementary. Some jurisdictions protect both traditional cultural expressions and traditional knowledge in a single instrument, while others use a range of laws and instruments to address the two areas, or specific aspects of them, distinctly.

10. The objectives and principles contained in the draft instruments will be discussed further at the Committee's eleventh session, to be held from 3 to 12 July 2007. At that session, certain key policy issues will also be discussed, as decided at the Committee's tenth session in November 2006. Participants have been invited to submit comments on these issues before the end of March 2007. These issues go to the core of what an international policy process must consider when creating new international norms for the protection of traditional knowledge and traditional cultural expressions against misuse and misappropriation. Details of the decisions made at the Committee's tenth session and the issues mentioned above, are available from the WIPO secretariat and on its website (http://www.wipo.int/tk/en) and hard copies of the draft instruments and of the lists of issues will be made available at the next session of the Permanent Forum. The mandate and future workplan of the Committee will be considered again by the WIPO General Assembly in September 2007 at Geneva.

11. All working documents, comments, papers, studies, databases, questionnaires and other materials prepared for consideration by the Committee, as well as comprehensive reports of its sessions, are publicly available online in English, French and Spanish (http://www.wipo.int/tk/en/igc/documents/index.html). Certain publications are also available in Arabic, Chinese and Russian.

[2] See http://www.wipo.int/tk/en/index.html.

Participation of indigenous peoples and local communities; WIPO Voluntary Fund

12. The States members of WIPO have repeatedly stressed the priority attached to enhancing the participation of the Permanent Forum and indigenous representatives in Intergovernmental Committee sessions. In active dialogue and cooperation with community representatives, WIPO member States and the WIPO secretariat continue to explore ways to enhance the participation of indigenous peoples in WIPO work on these issues. The practical experience and guidance of the Permanent Forum and its members are invaluable inputs to achieving this goal. States members of WIPO have expressed their "unanimous support for directly involving as much as possible representatives of indigenous and local communities in the work of the Intergovernmental Committee".[3]

13. In this regard, a number of practical steps have already been taken:

(a) A fast-track accreditation procedure for all non-governmental and intergovernmental organizations has been in place since the first session of the Committee, held in April 2001. More than 150 organizations have received accreditation, the majority representing indigenous peoples. No applicant has been denied accreditation;[4]

(b) The WIPO General Assembly has extended a formal invitation to the Permanent Forum to take part in Committee sessions and many participants have welcomed the active participation of the Permanent Forum;

(c) A number of member States have adopted the practice of funding the participation of representatives of indigenous and local communities in Committee sessions;

(d) The funds provided by WIPO to support member State participation from developing countries have been used in some cases by such countries to support the participation of leaders of their indigenous or local communities;

(e) Consultations and workshops at the national and regional level and other forums aimed at developing focused input for the Committee have included representatives of the Permanent Forum and indigenous and local communities as speakers and participants;

(f) The WIPO website provides for written contributions by accredited non-governmental organizations on the issues before the Committee;[5]

(g) Specific briefings and consultations for representatives of non-governmental organizations, particularly representatives of indigenous and local communities, are undertaken within the framework of Committee meetings;

(h) The WIPO secretariat has continued its practice of consulting with interested representatives of indigenous and local communities on draft documents and other material being developed for the Committee and related capacity-building and awareness documents, including a series of case studies and a distance learning course developed with the contribution of indigenous experts. During the open commentary processes described above, Committee draft materials, especially the

[3] See WIPO/GRTKF/IC/4/15, para. 60.

[4] http://www.wipo.int/tk/en/igc/index.html#accreditation.

[5] http://www.wipo.int/tk/en/igc/ngo/ngopapers.html.

draft provisions, directly incorporate textual proposals and extensive comments made by indigenous and local communities taking part in the process;

(i) The WIPO General Assembly has established the WIPO Voluntary Fund for Accredited Indigenous and Local Communities. This new Fund facilitates the participation in sessions of the Committee representatives of indigenous and local communities and other customary holders or custodians of traditional knowledge and traditional cultural expressions, which are already accredited by the Committee.[6] This Fund has so far received voluntary contributions from the Swedish International Biodiversity Programme and the Governments of France and South Africa. These generous donations enabled the Fund to finance the participation of eight representatives of indigenous and local communities and other customary holders or custodians of traditional knowledge and traditional cultural expressions in the tenth session of the Committee, held in November 2006. The WIPO Voluntary Fund will also fund the participation of a further eight such representatives at the eleventh session of the Committee, to be held in July 2007. This means that funding has been provided for all applicants so far considered eligible by an independent panel, which includes indigenous representation. Full reports detailing the operation and management of this Fund, including information on the funds received, applications for funding received and decisions taken in this regard by the advisory board elected in terms of the rules of the Fund, are available on the WIPO website. The extent of support to be provided by the Voluntary Fund depends on the resources donated to it. Any potential donors are encouraged to contact the WIPO secretariat for further information. WIPO warmly welcomes the statement by the Forum at its fifth session that the Forum "notes with appreciation the establishment of a Voluntary Fund by WIPO to enable the participation of indigenous representatives in the work of the WIPO Intergovernmental Committee on traditional knowledge and traditional cultural expressions, and encourages donors to contribute to the Trust Fund";[7]

(j) The Committee decided in November 2004 that its future sessions should be preceded by panel presentations chaired by a representative of an indigenous or local community. Such panels, with the theme "Indigenous and local communities' concerns and experiences in promoting, sustaining and safeguarding their traditional knowledge, traditional cultural expressions and genetic resources", were held at the commencement of the eighth, ninth and tenth sessions of the Committee, held in June 2005, April 2006 and November 2006, respectively. The panels comprise seven participants from indigenous and local communities in the geo-cultural regions recognized by the Permanent Forum, and their participation is funded by WIPO. A member of the Permanent Forum, Wilton Littlechild, has been one such participant.

Consultations and studies on customary laws and intellectual property

14. WIPO has initiated a process of study and consultation on two related questions, namely, (a) the role of the customary laws and protocols of indigenous and local communities in relation to their traditional knowledge, genetic resources and traditional cultural expressions, and (b) the relationship of customary laws and protocols with the intellectual property system. This work builds on an extensive

[6] http://www.wipo.int/tk/en/ngoparticipation/voluntary_fund/index.html.

[7] *Official Records of the Economic and Social Council, 2006, Supplement No. 23* (E/2006/43), para. 171.

background of consultation and reflection on the role of customary laws and protocols, both within the Committee and in the broader WIPO dialogue with indigenous communities (such as the fact-finding consultations in the late 1990s that set the tone for WIPO work in this area). As noted above, the draft provisions for the protection of traditional knowledge and traditional cultural expressions already take into account the role of customary law, and the study process would complement these developments. The full background is described in an issues paper that has been developed to facilitate further consultations on this question. To supplement existing studies, WIPO is commissioning studies from recognized indigenous legal experts on these issues; the first such study, concentrating on indigenous customary laws in several Latin American countries, will shortly be available in draft form.

15. Several mechanisms have been put in place to encourage and facilitate participation in this work by indigenous peoples and local communities. Interested parties are invited to submit papers, including commentaries, case studies and analyses, dealing with the relationship between customary law and protocols and (a) the protection of traditional cultural expressions and traditional knowledge against misuse and misappropriation; or (b) intellectual property law in general and the administration and development of the intellectual property system. Responses can be made to a draft background and issues paper that has been prepared,[8] but this is not compulsory. A set of suggested guidelines[9] has been prepared to stimulate papers. The Permanent Forum's participation in this work and contributions are most welcome and some discussions have been held with the Permanent Forum on this matter.[10]

Access to genetic resources and benefit-sharing

16. With respect to genetic resources, the work of WIPO does not concern the protection of genetic resources as such. Genetic resources (such as microbes or plants) are physical resources, not intellectual property, even though they are often integrally associated with traditional knowledge. WIPO does, however, deal with intellectual property issues related to genetic resources (such as biotech inventions derived from genetic resources). Any work on intellectual property matters relating to genetic resources must proceed within the understanding that there is a well-established international legal framework already regulating genetic resources issues, in the form of the Convention on Biological Diversity and the International Treaty on Plant Genetic Resources for Food and Agriculture of the Food and Agriculture Organization of the United Nations (FAO). Because of the close association of genetic resources with some traditional knowledge, some national biodiversity laws protect both genetic resources and traditional knowledge. A "disclosure of origin" requirement in patent applications is regarded by many States and others as a necessary instrument for ensuring the traceability of genetic resources and associated traditional knowledge and supporting compliance with free, prior and informed consent and fair and equitable benefit-sharing, in furtherance, inter alia, of the objectives of the Convention on Biological Diversity. Another perspective calls for alternative approaches to strengthening the link between equitable benefit-sharing and the intellectual property system. Discussions on these issues continue in WIPO and in other forums, with a revised paper scheduled to be reviewed at the

[8] See http://www.wipo.int/tk/en/consultations/customary_law/issues.pdf.

[9] See http://www.wipo.int/tk/en/consultations/customary_law/guidelines.pdf.

[10] For more information, see http://www.wipo.int/tk/en/consultations/customary_law/index.html.

next session of the Intergovernmental Committee. WIPO cooperates closely with the secretariat of the Convention on Biological Diversity in relation to these questions and has prepared technical studies at its request.[11]

Practical initiatives and capacity-building

17. The programme of activities in this area includes a range of complementary practical activities, such as capacity-building, legislative assistance, awareness-raising and training, and cooperation with a broad spectrum of national, regional and international initiatives. For instance, cooperation continues with indigenous women in Panama on the use of intellectual property tools to protect, preserve and promote their creative arts.

18. Particular attention is being paid to the development of intellectual property tools to prevent the illegitimate patenting of traditional knowledge, and the elaboration of intellectual property guidelines and associated information technology services relating to the recording, digitization and dissemination of intangible cultural heritage, for the economic and cultural benefit of indigenous peoples and local communities. This latter line of work, undertaken within the WIPO Creative Heritage Project, includes, for example, an ongoing partnership between WIPO, the International Labour Organization (ILO) and the Maasai Heritage Preservation Foundation of Laikipia, Kenya, for the enhanced protection, preservation and promotion of Maasai cultural heritage. A joint WIPO/ILO mission was undertaken to the Maasai community in October 2006, and the two organizations and the community continue to work closely together to further develop and implement this particular project.[12]

Contribution of expertise and experience by the Forum

19. Permanent Forum members attend sessions of the Intergovernmental Committee and have been represented at other national and regional events organized by WIPO. In 2002, the WIPO General Assembly, by a consensus decision, extended a specific invitation to the Permanent Forum to take part in Committee sessions. The Permanent Forum has played a prominent role in Committee discussions on the enhancement of indigenous participation in the Committee and contributed in particular to the development of the proposal for a WIPO Voluntary Fund for Accredited Indigenous and Local Communities, which has now been established. Permanent Forum members have taken part in two WIPO regional conferences on the protection of traditional knowledge and traditional cultural expressions.

Cooperation with other organizations and agencies

20. As requested by WIPO member States and as recommended by the Permanent Forum, WIPO continues to cooperate with other organizations and agencies on issues of concern to the Forum and to ensure that its work on the recognition and protection of traditional cultural expressions and traditional knowledge is complementary to and supportive of their work. These include: the secretariat of the Convention on Biological Diversity, FAO, ILO, the International Trade Centre

[11] For more information, see http://www.wipo.int/tk/en/genetic and http://www.wipo.int/tk/en/genetic/proposals/index.html.

[12] See http://www.wipo.int/tk/en/folklore/culturalheritage/index.html.

UNCTAD/WTO, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the United Nations Environment Programme, the United Nations Conference on Trade and Development, the Office of the United Nations High Commissioner for Human Rights, the World Health Organization, the United Nations Development Programme and the United Nations Industrial Development Organization. WIPO has also coordinated with the World Bank and the World Trade Organization and with a range of regional bodies and non-governmental organizations.

II. Information and suggestions regarding the special theme of the sixth session: "Territories, lands and natural resources"

21. Intellectual property laws and policies do not usually directly address questions of territories, lands and natural resources as such. This is because "intellectual property" refers to creations and innovations of the human mind, such as inventions, literary and artistic works and distinctive marks and indications. However, the loss of and threats to ancestral lands and associated natural resources are closely linked to the degradation and loss of the traditional knowledge systems of indigenous peoples. As a representative of an indigenous community stated at the most recent session of the Intergovernmental Committee, indigenous peoples are trying to adapt in a holistic manner to many changes in their economies, cultures and environment that imperil their traditional ways of life. Many are engaged in desperate battles for cultural survival, with loss of and threats to their ancestral homelands, the loss of cultural resources necessary to practise their traditions and maintain their cultures, and the degradation and loss of traditional knowledge, tribal integrity and tribal identity.[13] The report of the International Technical Workshop on Indigenous Traditional Knowledge,[14] held in Panama City in September 2005, which was welcomed and endorsed by the Permanent Forum at its fifth session, also noted that the loss of links to traditional territories is a significant threat to the continued preservation, protection and promotion of indigenous traditional knowledge. There are, therefore, clear linkages between issues of territories, lands and natural resources and the protection of traditional knowledge and traditional cultural expressions. As a result, the protection of traditional knowledge and traditional cultural expressions cannot be discussed in isolation from questions related to land, territories and natural resources, a perspective widely shared within the Committee. While the Committee is currently examining draft instruments providing sui generis protection for traditional knowledge and traditional cultural expressions, existing intellectual property mechanisms, such as geographical indications,[15] are seen by some as particularly suitable for protecting interests associated with traditional knowledge and traditional cultural expressions. A geographical indication is an indication that identifies a good as originating in a certain territory, or a region or locality in that territory, where a given quality,

[13] Statement by the Tulalip Tribes (WIPO/GRTKF/IC/10/7 Prov.); see also statements by the Maasai Heritage Preservation Foundation (ibid.), and the Russian Association of Indigenous Peoples of the North, Siberia and Far East (RAIPON) (WIPO/GRTKF/IC/9/14).

[14] E/C.19/2006/2.

[15] The term "geographical indications" is used here to encompass indications of source, geographical indications as referred to in the Agreement on Trade-Related Aspects of Intellectual Property Rights and appellations of origin.

reputation or other characteristic of the good is essentially attributable to its geographical origin.[16] "Champagne", "Tequila" and "Rocquefort" are examples par excellence of geographical indications. Geographical indications may be protected indefinitely, are collectively held and managed by the community that lives in the territory concerned and, in their very essence, directly embody a link between a certain good and a territory and natural resources found on it. Geographical indications have been registered in respect of traditional crafts, foods, beverages and other products in Portugal, Mexico and the Russian Federation. In addition, some traditional names and words, or traditional cultural expressions, may themselves directly act as geographical indications.

III. Information regarding the Second International Decade of the World's Indigenous People

22. In August 2006, WIPO provided detailed information to the coordinator of the Second International Decade of the World's Indigenous People on WIPO activities related to and in support of the programme of action of the Decade. The present note updates the information provided at that time.

Input towards a questionnaire

23. WIPO remains ready to contribute ideas towards the development of a standard questionnaire to facilitate the provision of information by United Nations agencies to the Forum.

24. Relevant conferences and other meetings to be held in 2007-2008 include the eleventh session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Geneva, 3-12 July 2007) and the WIPO General Assembly (Geneva, September 2007).

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[16] This is the description of a "geographical indication" in the Agreement on Trade-Related Aspects of Intellectual Property Rights, article 22.1.